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IN THE

Supreme Court of the United States

October Term, 1966
No. 149

SANFORD E. ADAY, WALLACE DEORTEGA MAXEY, and WEST COAST NEWS COMPANY, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Motion for Leave to File Brief of Citizens for Decent Literature, Inc. an Ohio Corporation as Amicus Curiae and Brief.

Citizens for Decent Literature, Inc. (CDL)[1] respectfully requests leave of Court, under Rule 42.1 of the Revised Rules of the Supreme Court of the United States, to appear as amicus curiae and to file a partial brief in support of the respondent in the above-entitled cause.

CDL's request to appear as amicus curiae prior to this Court's consideration of Aday's petition for a writ

[1]Citizens for Decent Literature, Inc., an Ohio corporation, with local affiliates throughout the United States, referred to hereinafter for convenience by its short title "CDL", is a non-profit, non-sectarian, and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent, and wholesome literature, by cooperating with law enforcement in the enforcement of the laws.

of certiorari was triggered by a newspaper announcement[2] that the Solicitor General of the United States had, in his memorandum reply, taken a position diametrically opposed to the prevailing rulings of the trial and appellate courts[3] below, which support the judgment of conviction herein. The Solicitor General's willingness to concede error and urge remand denies the people full representation in support of the judgment in this case and deprives this Court of the type of advocacy which is essential to a correct determination of the proper rule of law. The Solicitor General's concession is a major blow to the nation-wide effort to apply obscenity controls both in pending prosecutions and in convictions presently on appeal.

In opposing the position taken by the Solicitor General, CDL contends that Chief Justice Warren and Associate Justices Brennan and Fortas, as authors of the lead opinion in the "previous restraint", "no clear ma-

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[2]On September 21, 1966, the attention of CDL was directed to an article in the Washington Post, dated September 19, 1966, headlined "U.S. Refusal to Defend Conviction Heartens Sex Book Distributor" and reading in part as follows:

> "Sanford E. Aday, a mail order dealer from Fresno, California, was given a fresh chance to overturn criminal penalties when the Justice Department refused Friday to defend his conviction. . . .
>
> "The Solicitor General agreed with one of Aday's claims. He said the Court of Appeals had failed to apply a rule of the Ginzburg-Fanny Hill cases that established 'redeeming social importance' as a new and separate test of obscenity. Previously established standards measured the material's appeal to the prurient interests of the average person and whether the material was 'patently offensive'.
>
> "Since the lower court did not even mention the Supreme Court's new decisions, Marshall suggested that the justices send the case back for reconsideration. There, the prosecution and defense would argue over the need for a new trial."

[3]The decision of the United States Court of Appeals for the Sixth Circuit was handed down on March 22, 1966, the day *after* this Court's rulings in the *Ginzburg, Mishkin* and *Fanny Hill* cases.

jority decision" in *Fanny Hill*[4] never intended that their opinion, developed on those broad facts (previous restraint) be applied *in instructing a jury in a criminal obscenity prosecution* dealing with specific facts and specific conduct. If it was so intended, then the rationale expressed in their *Fanny Hill* opinion loses its integrity, for to apply that reasoning in a criminal prosecution is to turn *Roth* into an amorphous mass which either (1) bears no logical relationship to the rule laid down by this Court in 1957, or (2) if related, has acquired a tautological form which is misleading and subversive to the cause of public decency over which the obscenity statutes stand guard.[5]

In our view, the Solicitor General has completely misread the significance of the several opinions in *Fanny Hill*. In the first instance, and most importantly, the broad and unwarranted construction given to the opinion of Justices Warren, Brennan, and Fortas in *Fanny Hill* completely misses the fine constitutional point made by those three justices. Furthermore, that case was a no-clear majority decision.[6]

Although a motion such as this is not favored, and may be filed only if submitted a reasonable time prior

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[4]*Memoirs of a Woman of Pleasure, et al. v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413.

[5]If "utterly without social value" is to be required as a separate and independent test in the jury's deliberation, it, without doubt, creates a new *Roth* test which will overrule state statutes drawn in reliance on the *Roth* pronouncement. See Point 1D1, *infra* If it is required as an equivalent of the *Roth* test, then it has done nothing but create redundancy which did not exist before.

[6]To arrive at a constitutional test by "averaging" the several opinions which are in disagreement does not create respect for the rule of law. Particularly is this so when two of the six opinions being "averaged" refuse to follow the law (*i.e.*, to concede that Government has any right whatsoever to control obscenity). The Solicitor General's concession which speaks in

(This footnote is continued on the next page)

to the consideration of the petition for writ of certiorari, the unusual nature of one of the issues herein, and the very recent and unexpected turn of events which have brought this issue into focus,[7] characterize the case, movant submits, as one which is *sui generis,* and this motion as one which should be given favorable consideration on the matter of timeliness.

Consent to the filing has been requested of the parties herein. As of the date of printing, only the reply of the Solicitor General, dated October 19, 1966, has been received, which withheld consent because of the belatedness of the request.[8]

It is submitted that the arguments presented on this issue in the brief herein are of primary importance and should be considered by this Court on the petition for writ of certiorari in the above-entitled cause. It is therefore respectfully requested that the moving party be granted permission to file the within brief in support of the respondent's position.

Respectfully submitted,

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terms of "principles of the plurality opinion" completely ignores firmly rooted principles of our jurisprudence governing the force and effect of no clear majority opinions. See Justice Clark's dissent in *Fanny Hill,* 16 L. Ed. 2d 1, at page 18; *Commonwealth of Pennsylvania v. Robin, et al.,* 218 A. 2d 546. Musmanno dissenting (March 22, 1966), and the comments of Assistant Professor of Law G. Robert Blakey in 41 Notre Dame Lawyer 1058.

[7]We refer here to the Solicitor General's concession of error which leaves the People's cause without advocacy.

[8]It does not seem as though time should be made the essence at the expense of thoroughness. Of the 20 obscenity cases presently before this Court, three have been held over from the 1964 term and 14 from the 1965 term. None of these 20 cases have discussed the points of argument made herein.

IN THE

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October Term, 1966
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Petitioners,

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UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Brief Amicus Curiae of Citizens for Decent Literature, Inc. an Ohio Corporation, in Support of Respondent.

ARGUMENT.

I.

THE FEDERAL CONSTITUTION DOES NOT REQUIRE A TRIAL JUDGE TO INSTRUCT AN OBSCENITY JURY IN A CRIMINAL PROSECUTION THAT, HAVING FOUND THE PREDOMINANT APPEAL OF THE SUBJECT MATTER AND THE PUBLISHER'S INTENT (PRESUMED) IS AN APPEAL TO PRURIENT INTEREST WHICH IS SUBSTANTIALLY BEYOND CUSTOMARY LIMITS OF CANDOR, IT MUST ALSO FIND, AS AN ADDITIONAL REQUIREMENT, THAT THE SUBJECT MATTER HAS NO REDEEMING SOCIAL IMPORTANCE. TO SO REQUIRE WOULD MAKE THE JURORS DETERMINERS OF THE LAW AS WELL AS THE FACT.

Amicus finds it difficult to comprehend how a prosecutive agency can entertain the view expressed in the Government's reply, given the historical facts herein and the law laid down by this Court in *Roth* and subsequent cases. The concession made is at complete variance with the law laid down in *Roth* and with the view of the law held by the United States attorneys who tried the *Aday* case, by Federal District Judge Noel Fox who interpreted the law in the trial court, and by the three justices in the Circuit Court of Appeals which recently affirmed the matter on appeal.

There is no *opinion* of this Court which the Solicitor General can point to as authorizing such a concession. The controlling law laid down by this Court in reviewing the federal conviction of Samuel Roth in *Roth v. U.S.*, 354 U.S. 476, is quite clear on this point, holding to the contrary on the issue which the Solicitor General is now willing to concede to be reversible error.

Aday was tried under substantially the same conditions as Roth. Federal District Judge Fox in *Aday* instructed his jury under substantially the same rule of law as did the trial judge in *Roth*. Judge Fox was entirely correct when he expressed his view that the lack of redeeming social importance, "is not an element of the definition (of obscenity) itself" or "an essential element of obscenity" but merely "a consequence of obscenity." (Appendix to Petitioner's Brief in the Court of Appeals, Vol. III, Page 535a.) Lack of redeeming social importance is the factor which permits the trial judge to give the matter to the jury on the issue of fact.[1]

[1]We believe the analysis of the Appellate Division of the Supreme Court, Second Department, to be correct when it said, in

A. The Roth Court, in Its Review of a Jury Trial Situation, Did Not Designate "Redeeming Social Importance" as a Matter for the Jury.

In *Roth v. U.S.*, this Court did *not* treat redeeming social importance as a consideration for the jury; rather that matter was a consideration taken up by the Appellate Court (this Court) in reviewing Roth's conviction on appeal.

At the most, "redeeming social importance" is a matter to be considered by the Court in deciding the *issue of law* which is involved.[2] It is not a test to be submitted to the jury in trying issues of fact.

The above distinction stems from the fundamental rule of law that the determination of obscenity is a mixed question of law and fact. The Court has a proper role and the jury has its proper role. The differentiation between the two is brought into focus when a case is tried to a jury (as was Roth), for there, the functions of the court and the jury are separated, and each takes on a distinguishing characteristic. Having separate and distinct functions, the two bodies are gov-

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reversing trial judge Shapiro's decision, in *N.Y. v. Birch, et al.*, 269 N.Y.S. 2d 752, 754 (May 2, 1966):

> "We do not agree with the learned justice at Special Term that these books *have sufficient redeeming importance* if they furnish escape literature to those who, as he puts it, 'because of lack of education, the meanness of their social existence, or mental insufficiency, cannot cope with anything better: This much social significance must by definition be inherent in literature which nevertheless has been proscribed by the Supreme Court as 'utterly without redeeming social importance'."
>
> "In view of the foregoing, the action must be remitted for trial, particularly on the question of obscenity ...." (Our emphasis.)

[2]It logically follows from *Roth v. U.S.*, that the trial court also should apply the same rule when it is faced with the *issue of law* involved at that stage of the proceedings, *i.e.*, whether in the first instance, a case has been made for submission to the jury.

erned by different rules in carrying out their respective duties and objectives. This is so because of the nature of the obscenity controversy.

The obscenity controversy places in the balance two opposing forces which are set in motion by our constitutional form of government. On the one hand, there is a claim of the individual's right of free speech and press, as guaranteed by the First and Fourteenth Amendments. On the other hand, there is the claim to supremacy of the right of government to regulate public morals, by proscribing obscenity, as reserved to state governments by the Ninth and Tenth Amendments. In *Roth,* this Court drew the balance between the two conflicting powers which it expressed in terms of the *Roth-Alberts* test, namely, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." When such a state of facts exists, the police power, reserved to state governments by the Ninth and Tenth Amendments, is operable, and can act to proscribe such material. In each jury case, therefore, the *court* must initially decide upon which side of the line the controversy is located — whether it is protected as a matter of law (which is a matter for the Court) or is a question of fact (for the jury as the fact finder.)

Consequently a trial court, when presented with the question whether the matter should be presented to the jury on the issue of fact, must ask itself *both* questions, "Does the matter as presented in the market place have redeeming social importance as a matter of law?" or, in the alternative, "Has a question of fact been raised for the jury?" *i.e.,* can it be said that reasonable men may differ whether the conduct involved is in

violation of the law and the material obscene." Justice Brennan dissenting in *Kingsley Books, Inc. v. Brown,* 354 U.S. 425, 448, 1 L. Ed. 2d 1469. They are not equivalent tests in as much as they are mutually exclusive, each describing what does not lie on the other side of the dividing line.

In such a case (jury trial) it is an entirely erroneous statement of the law to say that the Court in the first instance finds the obscenity crime and then submits the matter to a jury for its determination. The court does not find the fact before submitting the fact to the jury —the Court determines the law (*i.e.,* whether the conduct involved is protected as a matter of law because of redeeming social importance, or is a question of fact for the jury to decide).[3] Conversely, the jury does not determine the law (*i.e.,* whether the conduct is protected as a matter of law because of the redeeming social importance) along with the fact—the former is a matter for the Court's determination before it is ever submitted to the jury.

B. The Court's Refusal to Instruct the Jury on "Redeeming Social Importance" Was Not an Abridgment of Petitioner's Constitutional Rights.

1. The Instruction Requested by Petitioners Was an Improper Statement of the Law as Applied to the Facts of This Case.

The petitioners' requested jury instructions that

> "a writing may not be deemed obscene unless it is utterly without redeeming social importance. In

[3]The number of Trial and Appellate Courts which have erred in their analysis are substantial. To *amicus,* the principle seems elemental. See Justice Brennan dissenting in *Kingsley Book, Inc. v. Brown, supra.*

other words, the Constitution protects all material relating to sex except that which is totally devoid of social importance. The word 'redeeming' in the context herein refers not to a balancing of the alleged pruriency against the social importance of the material, but rather to the presence of matters of social importance in the content which gains for the material its position as constitutionally protected utterance. The jury will therefore keep in mind that in addition to the standards for judging obscenity, heretofore defined, no writing can be found to be obscene unless the writing is also utterly without redeeming social importance as the Court has defined it. . . ."

was derived from *Zeitlin v. Arnebergh*, 31 Cal. Rptr. 800, 813, a case whose facts are totally unrelated to the facts of this case. Though the language used by the California Supreme Court is apropos in the *Zeitlin* context, petitioners' facts afford no opportunity for its employment here as a proper instruction governing the law of this case.

In *Zeitlin*, a legitimate bookseller, Jacob Zeitlin, wanted to sell Paul Ferguson, a English professor at a Los Angeles college, a copy of "Tropic of Cancer," as to which there was a recognizable claim of literary value in the modern literary field. Under the variable approach to obscenity, no violation of the obscenity law is made out on these facts. *Ginzburg v. U.S.*, 383 U.S. 463, 16 L. Ed. 2d 31, 86 S. Ct. ....; *Mishkin v. N.Y.*, 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. ...., March 21, 1966. Nevertheless, Roger Arnebergh, the City Attorney of Los Angeles, threatened to prosecute

if the sale were made,[4] and with this background, both the bookseller and the professor, as plaintiffs, brought suit asking for a declaratory judgment to effect the sale on the grounds that "Tropic of Cancer" was not obscene.

On July 31, 1963, the California Supreme Court handed down a declaratory judgment that Tropic of Cancer was not obscene, in that it was not hard-core pornography, saying at page 813:

> "By examining the origin of the phrase in Roth we are led to a construction which gives the whole phrase a consistent meaning: 'redeeming' refers not to a balancing of the pruriency against the social importance of the material, but rather to the *presence* of matters of social importance in the content which will recover for the material, its position as constitutionally protected utterance."

While the language of the California court throughout a good deal of the opinion is inaccurate in that it treats too broad a reach beyond the narrow issue raised by the peculiar facts which brought the matter into court, it is now quite clear as indicated above that, *as applied to the limited facts of the Zeitlin* case, the language of the California court quoted above was substantially correct.

Restricting the language to the facts of the *Zeitlin* case, what the California court was in effect saying was that in the case of a sale of Tropic of Cancer to an English professor, the pruriency of the book could not be balanced against its social importance, as

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[4]The City Attorney's action was in keeping with constant obscenity concepts. No attempt was made to interpret the California Statute as employing variable obscenity concepts.

small as that social importance might be, and as great as the pruriency might be to the *average person* (general public). Quite obviously this is so because the plaintiffs (*Zeitlin* and *Ferguson*), in both their pleadings and case in chief had established a special audience to whom the book had a special redeeming social value. The fact situation under examination by the Court was one in which it was apparent the book was traded in the market place for its social importance (slight though it might be) and was not disseminated for its prurient appeal.

If the California Supreme Court meant that this slight social importance on limited facts would protect the subject matter *under all circumstances of sale,* then quite obviously under this Court's recent rulings, the California Court was wrong in its interpretation of the *Roth* test. *Ginzburg v. U.S., supra; Rebhuhn v. U.S.,* 109 F. 2d 512, cert. den. 60 S. Ct. 976, 84 L. Ed. 1399, 310 U.S. 629 (Second Circuit, 1940). See *United States v. Burstein,* 178 F. 2d 665 (Ninth Circuit, 1949). This is so because the California Supreme Court was interpreting a statute construed by the California Court as an attempt by the State Legislature to codify the *Roth* decision.[5]

To say that the language of the California Court quoted above was proper on the Zeitlin facts does not mean that it is proper language in all cases. More specifically, it does not mean that it is a proper instruction

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[5] *Zeitlin v. Arnebergh, supra,* at page 813:

"This language, indeed, is the language of Roth." Compare in this regard, the concurring opinion of Justices Fuld and VanVoorhis with that of Justices Desmond and Dye in *New York v. Richmond County News,* 175 N.E. 2d 681.

in the *Aday* case. An examination of the record in this case clearly demonstrates that the petitioners' business was diametrically opposite to that which was considered in *Zeitlin*. In *Zeitlin*, the bookseller and professor raised a legitimate claim in regard to a protected value; in *Aday*, the nature of petitioners' business establishes just the opposite. Aday was not trading in "legitimate" values. The audience to whom the material was aimed was clearly identified by the sales pitch on the covers and flyleafs of the books introduced into evidence and the subject matter itself. The record clearly establishes that petitioner was engaged in "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.",[6] which the *Roth* case indicates is a non-protected value.

2. The Instruction Requested by Petitioner Goes Beyond Anything Which the Zeitlin Case Authorizes.

Even assuming that the matter of "social redeeming importance" is not a matter of law for the court to decide[7] and may properly be given in an instruction to a jury as an *equivalent* of the test approved in the *Roth* case, still the instruction requested by the petitioners was erroneous, *because it defined the terms so as not to make them equivalent.*

In framing his instruction petitioner added to the language taken from Zeitlin the following sentence:

> "The jury will therefore keep in mind that *in addition to* the standards for judging obscenity, here-

[6]Also described as "pandering" in *Ginsburg v. U.S.*, 16 L. Ed. 2d 31, 36. Many fail to recognize that "pandering" can be established from the subject matter itself, as well as the advertising (use).

[7]Argued in Point 1A.

tofore defined, no writing can be found to be obscene *unless the writing is also* utterly without redeeming social importance as the Court has defined it. . . ." (Our emphasis.)

Petitioner's use of the words "in addition to . . . unless the writing is also . . ." makes it clear that what was being sought was the imposition of an *additional* test which was *not* the equivalent of the Roth prurient interest-dominant theme test.

Assuming the above language can be interpreted to state an equivalent, and not an additional requirement, still the wording is erroneous. The vice of the instruction lies in the fact that the language did not relate to the facts and circumstances in the controversy; that is, the "redeeming social value" which would authorize an acquittal was not required to be found from the circumstance of presentation and dissemination under which the material was traded in the market place. *Ginsburg v. U.S.*, 16 L. Ed. 2d 31, 38. Under petitioners' language, the jury, having found that publisher Aday's dominant intent (presumed) was to appeal to the prurient interest in a manner which was substantially beyond contemporary standards, would have to return a "not guilty" verdict if it felt that the book had value to sociologists or law enforcement in connection with the study of pornography and an analysis of its growth in recent years.[8]

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[8] *Amicus* concedes that a study of the contents of Sex Life of a Cop published in 1958 has limited value to specialists investigating the growth of pornography in the years 1958 to 1966. Without an understanding of its contents as a level of reference, one cannot recognize the fantastic growth in salaciousness of the material offered, or check the progress (or lack of the same) of law enforcement in this area.

C. The Result Reached in "A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of the Commonwealth of Massachusetts" Does Not Stand for the Proposition That a Jury in a Criminal Case Must Be Instructed in a Manner Other Than That Approved in Roth v. United States.

At page 28 of the Petition for a Writ of Certiorari, petitioners cite the *Fanny Hill* result as indicating that a trial court must instruct the jury in a criminal case on the requirement that the material be "utterly without redeeming social importance." The Fanny Hill result however is *inapposite* on this point in that the requirement voiced by Chief Justice Warren and Associate Justices Brennan and Fortas in the lead (not the majority) opinion[9] that "each of the three federal constitutional criteria is to be applied independently" *was in regard to an injunction decree and not, as here, a criminal prosecution.* There are problems in an injunction action which are not present in a criminal prosecution and which, depending on the circumstances, may require the case to be handled in a different manner.

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[9]Fanny Hill was a no-majority decision with only three justices joining in the lead opinion. As to the net effect of the lead opinion, see the evaluation of Justice Clark in his opinion in *Fanny Hill*, 16 L. Ed. 2d 1, at page 18. See also the opinion of Justice Michael Musmanno dissenting in *Commonwealth of Pa. v. Robin*, ... Pa. ...., 218 A. 2d 546 (Ma 22, 1966) and the comment of Assistant Professor of Law G. obert Blakey in 41 Notre Dame Lawyer 1055 at 1058.

1. The Broad Scope of the Inquiry in a Restrictive Injunctive-Type Situation Requires That the Tests Be Applied Independently, so That All Factual Situations Are Considered.

The requirement voiced in the opinion of Justices Brennan, Warren and Fortas at page 6 that:

> "A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. *Each of the three federal constitutional criteria is to be applied independently.* . . ." (Our emphasis.)

is not so startling when one considers that this Court in *Fanny Hill* was reviewing an injunctive-type decree rather than a criminal conviction.[10]

It does not follow, however, that the criteria are applied independently in criminal cases, nor does it mean that where, as in this case, there is a proper finding in a criminal case that the dominant appeal is to prurient interest (which, as defined in the Model Penal Code, includes patent offensiveness) the subject matter may still have redeeming social importance under the circumstances at issue. In a criminal case, a finding that the dominant theme—prurient interest test—has been met would necessarily be inconsistent with a finding of redeeming social importance. See here the legislative policy statement contained in the Utah Statutes defining obscenity, *infra* which equates "prurient interest" with "utterly without redeeming social importance."

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[10]Justice Brennan drew attention to this distinction at Footnote 3 of his opinion in the *Fanny Hill* case.

In the review of an injunction, the United States Supreme Court is confronted by a decree forbidding *all* distributions and encompassing a myriad of fact situations. In contrast, a criminal conviction embraces one given set of facts. The broad scope of the inquiry in an injunction situation requires that the test be applied independently, so that *all* factual situations are considered.

For example, assuming slight historical value, as hypothesized by the Massachusetts Supreme Court—what of the possible distribution to literateurs who might wish to study Fanny Hill for its historical significance in the development of the English novel, or the sociologists, who might have occasion to refer to it in their studies, or attorneys who might study it in connection with their efforts to arrest the spread of pornography?

The Massachusetts Statutes under consideration by the High Court, both criminal and civil, allowed no specific exemptions or defenses for situations which did not involve "pandering." Compare in this regard, the American Law Institute recommendations contained in Section 207.10(4)(c) of the Model Penal Code (1957 draft) which provides:

> "The following shall not be criminal offenses under this section. . . . (c) Dissemination to institutions or individuals having scientific of other special justification for possessing such material. . . ."

Moreover, the Massachusetts statutory procedure authorized "collateral uses" of the injunctive decree, which further gave the impression of inhibiting legitimate use of the book. Footnote 4 of the opinion of Justices Brennan, Warren and Fortas noted that Section

28H of the Massachusetts Injunctive Statute, made a decree that a book was obscene "admissible in evidence" in a criminal prosecution under Section 28B and provided that "if prior to such offense a final decree had been entered against the book, the defendant, if the book be obscene . . . shall be 'conclusively presumed to have known' the book to be obscene." Justice Brennan's opinion noted at footnote 5 that such "collateral uses of the declaration" would have a "serious inhibiting effect on the distribution (legitimate) of the book. . . ."

Under a strict interpretation of the Massachusetts Statutes, the distribution noted above (to literateurs, sociologists, etc.) would have been barred by the Massachusetts decree.[11] To draw in focus the constitutional issue underscored by the Opinions of Justices Brennan, Warren, and Fortas, one need only to compare in contrast the results which should follow in the criminal forum, were the same factual situation to exist. Such distributions are not a violation of the obscenity laws.[12] There is absent the pandering aspect. The predominant appeal of the material is not to prurient interest, but is rather to a legitimate social purpose which has social value. Accordingly, the Court would be required to rule that, as a matter of law, there was redeeming social importance and no jury question was presented.

In our view, the opinion of Justices Brennan, Warren, and Fortas would have been more precise had it expressed the obvious—that the theory of "independ-

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[11]The "conclusive presumption" position of the Massachusetts Injunctive Statute is criticized by the drafters of the Model Penal Code. See the reporter's comments in the 1957 draft at page 51.

[12]See the Tropic of Cancer result discussed in Point I-B-1.

ent" tests, relating as it does to variable obscenity concepts, has limited application to the injunctive type proceeding and is not to be carried over and applied carte blanche in criminal areas. If these three justices are to be consistent, they would have to agree that in a criminal case the "dominant theme—prurient appeal" test and "social value" test coincide, so that in the criminal forum there is but one, and not several independent tests.

In criminal cases, it is at complete odds with the "variable" concept expressed by the majority opinion in Mishkin and Ginzburg to say either that the "utterly without redeeming social value" phrase is an independent test, or that it is a necessary part of the definition of "obscene." If the dominant appeal of the material is aimed at prurient interest as defined in the Model Penal Code, then the conduct is in the area of criminal activity and the subject matter is utterly without redeeming social importance under the circumstances. Utah Revised Statutes, Section 76-39-11. In criminal cases, unlike the situation which exists in injunction cases, a specific set of facts are in issue and the two tests "coalesce."

It must be observed that, in reviewing the book Housewife's Handbook on Selective Promiscuity, the majority in Ginzburg did not apply the social value test independently, but rather considered only the dominant appeal of the material in the light of the precise facts being reviewed.[13]

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[13]In *Ginzburg* the Court said at page 39:

". . . we cannot conclude that the court below erred in taking their own evaluation at its face value and declaring the book as a whole obscene *despite the other evidence*. . . ." (our emphasis).

D. To Superimpose "Utterly Without Redeeming Social Importance" as an Additional Test for a Jury to Consider Under the Roth Test, at This Late Date, Would Frustrate the Public Policy of This Nation and the Efforts of Law Enforcement in Its Search for a Means of Controlling Obscenity.

We have heretofore pointed out that the phrase "and is utterly without redeeming social importance" was never intended by this Court as a test for the jury in the *Roth* case.[14] Before commenting upon the consequences which would flow from a reversal of this position, it is important to focus upon the circumstances under which the issue first appeared in this Court in the *Ginsburg, Mishkin* and *Fanny Hill* cases—an event which merits special attention.

Following the arguments in the *Fanny Hill* case on December 7, 1965, one well-informed attorney (apparently from a defense firm in Washington or New York, judging from the tenor of the conversation) while waiting in line outside the cloakroom of the United States Supreme Court, was overheard by CDL attorneys to remark to one of his associates that the most significant feature of the three cases was the fact that all three governmental attorneys *conceded without argument* that there were three separate tests, whereas six months before, said he, "No government attorney would accede to that concession." And so it was—there never was any full-scale opposition or argument on this issue in those cases. The three governmental attorneys entered a default on this very important issue as an expedient

[14]The initial appearance of the phrase and the forces operating to perpetuate its existence are discussed hereinafter in Point 1D1.

route in presenting their basic arguments.[15] For want of argument, the issue was never examined closely. Had a close examination been made it would have revealed the path to be covered with primroses.

1. Were the Court to Reverse the Position It Took in Roth, the State Obscenity Statutes Enacted in Reliance on That Decision, and the Successful Prosecutions Rendered Under Those Statutes Would Be Invalidated.

It should be noted that but two states have included the words "and is utterly without redeeming social importance" in their defeinition of "obscene," in the manner urged by petitioners. California Penal Code Section 311.2,[16] Tennessee Code Annotated Section 76-39-11.[17]

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[15]See the transcript of the arguments in the *Fanny Hill* case on December 7, 1966 at page 9:

"MR. JUSTICE BRENNAN: Do you think it's clear, do you, as apparently your predecessors here today have, that the Court has clearly established a test of obscenity as a 3-component test, as an appeal to prurient interest, and utterly without social value and something that is patently offensive?

"MR. REMBAR: Yes, I think that is the implication.

"MR. JUSTICE STEWART: Where do you get that, from what cases?"

No further discussion was had in the arguments on this point.

[16]Assembly Bill 1979 as originally introduced during the 1961 session of the California Legislature did not have the phrase "and is utterly without redeeming social importance" as a part of the definition of obscenity. After four amendments in the Assembly and two in the Senate, which the Assembly refused to concur in, the amendment "and is matter which is utterly without redeeming social importance" was added by a 6-man committee in conference (three Assemblymen, three Senators) and passed by both bodies and signed into law. Senate Journal page 4426 of June 16, 1961 and Assembly Journal of June 16, 1961 at page 5975. It thus appears that the bargain struck by the joint committee and not this Court's direction was the original motivating force for this "view." As noted in petitioners' brief at page 16, District Judge Fox recognized the woodpile wherein the thought first arose.

[17]The Tennessee bill, as originally introduced, did not have the phrase "and is utterly without redeeming social importance"

(This footnote is continued on the next page)

One other state, the State of Utah, employs the same phrase—but the Utah statute followed an entirely different approach, in that it specifically adheres to the rule laid down by this Court in *Roth* in 1957. The Utah Legislature used the phrase *not* for the purpose of setting forth an additional requirement for the fact finder, but rather for the purpose of making it known that as a matter of state policy "prurient interest", as therein defined, had no social value. Section 76-39-11 of the Utah Statutes provides in part:

"76-39-11. Whenever it appears in this act, the word 'obscene' shall have the following meaning:

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as a part of the definition of obscenity. Some indications of how the phrase found its way into the Tennessee law is revealed in a letter of the Counsel for Periodical Distributors Association, Inc., to Mr. Jack Drown, one of the five independent wholesale distributors in Los Angeles County. The letter was filed with the Los Angeles County Commission on Indecent Literature in opposition to Proposition 16, an Anti-Obscenity Statute appearing as an initiative measure on the California ballot on November 8, 1966. The California initiative measure generally follows the American Law Institute Model Penal Code definition of obscenity (which does not contain the phrase), approved by this Court in *Roth*, and was proposed as a means of overcoming the stagnation in obscenity control caused by the adoption of the California legislation in 1961. The advice of the C.P.D.A. to Mr. Drown was to follow the procedures taken by their organization in Tennessee:

> "Sid Bernbaum of Memphis, Tennessee, and Bill Palmer of Topeka, Kansas, have had a substantial amount of success in fighting overly restricted obscenity legislation. It might be a good idea to contact them with respect to tactics and procedure if you find it necessary to actually campaign against this measure. Sid Bernbaum and the other Tennessee wholesalers worked with representatives of the movie industry, and you should consider the possibility of a similar joint approach in California.
>
> "Please keep us posted as to what develops and let us know if we can be of any further assistance. Recently, at the request of the attorneys for the wholsalers in Tennessee, we wrote a long opinion letter to the key members of the Tennessee Legislature, and *the result was that the C.P.D.A. recommendations were followed strictly down the line.* If a similar step seems advisable in California, we would be glad to take it." (our emphasis.)

> Whether to the average adult person, applying contemporary community standards, the dominant theme of the material or the conduct taken as a whole appeals to the prurient interest. . . . *Prurient interest* shall mean a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and *is a matter which is utterly without redeeming social importance.*" (Our emphasis.)

It is apparent that the drafters of the Utah Legislature had a crystal-clear understanding of the Roth concept. Were petitioners herein to prevail, would require this Court to strike the Utah Legislation as Unconstitutional.

The remaining State Legislatures which have amended their obscenity statutes to conform to the *Roth* test have codified the standard set forth in *Roth* in reliance on the jury instructions and the holding in that case. This, Justice Warren noted in his dissent in *Jacobellis v. Ohio,* 378 U.S. 184, 199, 84 S. Ct. 1676, 12 L. Ed. 2d 793, 805:

> "Recently this Court put its hand to the task of defining the term 'obscene' in Roth v. U.S. . . . *It has also been relied upon by legislatures. . . .*" (Our emphasis.)

If this Court now were to change the instructions which must be given to a jury from that which it specifically had approved in *Roth,* then surely those state statutes which were adopted in reliance on the *Roth* test will fall, together with the successful prosecutions which were achieved under those statutes.

The no clear majority result and confusion in the *Fanny Hill* case has already brought about a crises to law enforcement in one state. In *Arizona v. Arizona Magazine Distributors, Inc.*, Unreported, in the Superior Court of the State of Arizona in and for the County of Mariposa, No. 47264, Superior Court Judge Howard F. Thompson, ruling on a motion before a trial *de novo* after a jury conviction in the justice court, held the Arizona State Obscenity Statute, adopted by the Arizona State Legislature in 1964 in reliance on Roth, to be unconstitutional for this very reason.[18] Said Superior Court Judge Thompson:

> "The statute defines obscenity as 'appeal to prurient interest . . . going substantially beyond customary limits of candor. . . .' The statute, we have pointed out, contains the two distinct elements set forth in *Manual* which the Court declared were necessary in the proof of obscenity as defined in Roth, i.e., prurient interest appeal and patent offensiveness. Omitted from the statute, however, is the third element: *The material must be utterly without redeeming social value.* In Memoirs it was held that under the Roth definition the three elements must coalesce before the material can be prosecuted as obscene.
>
> 'A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be

[18]The case is presently on appeal.

weighed against nor cancelled by its prurient appeal or patent offensiveness. Memoirs v. Mass.'

"Lacking the social value criterion in its definition of obscenity, the statute thus fails to meet the constitutional requirements set forth in Memoirs as necessary to meet the Roth test of obscenity." (Our emphasis.)

Unless the false impression created by the opinion of Justices Brennan, Warren, and Fortas in *Fanny Hill* is corrected by this Court in the case herein, the same is certain to cause greater havoc than did this Court's development of restrictive rules in "previous restraint" cases during the period 1958-1965. See CDL Commentaries on the Law of Obscenity, Sept. 1966, Vol. 1. No. 3, pages 1-4 *et seq.* and CDL's Brief Amicus Curiae in the *Fanny Hill* case at pages 38, *et seq.*

2) The Recent Mistrial in U.S. v. Hamling Is a Preview of What Reasonably Can Be Expected Were This Court to Retreat From Its Original Position in Roth That the Prurient Interest Defined in That Case Is Itself a Matter Which Is Utterly Without Redeeming Social Importance.

Consistent with the Solicitor General's position on appeal in this and the *Ginsburg* case (and equally as incomprehensible) was the position taken by the government attorneys at the trial level in the recent federal prosecution in Houston, Texas, against the "Nightstand operation". *United States v. Hamling et al.*, U.S. Dist. Court for the Southern District of Texas, Houston Division, CR 65-H-172, unreported.[19] The prosecutor

[19]A federal grand jury at Houston, Texas, on Sept. 11, 1965, indicted 7 persons and 4 corporations for interstate shipment

(This footnote is continued on the next page)

himself sowed the seeds for the hung jury and mistrial which ensued.

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of obscene paperbacks books. Indicted were the publishers and national distributors located in San Diego, California, a printer in Los Angeles, California, and a second printer in Sandusky, Ohio, and the 4 corporations involved. The books involved in the indictment were: Orgy Club by Tony Calvano, copyright 1964 by Pillar Books, PB 833; Sin Summer by Alan Marshall, a Pillar Book, PB 834; Shame Hunger by Tony Calvano, copyright 1964 by Pillar Books, PB 850; Temple of Shame, a Leisure Book, LB 673; Virgins Inc., a new Nightstand book, NB 1731; Passion Carousel by Tony Calvano, copyright 1965, by Corinth Publications, 5839 Mission Gorge Road, San Diego, a Sundown Reader, SR 543; and Swap Sect by Tony Calvano, copyright 1965, Corinth Publications, 5839 Mission Gorge Road, San Diego, a Nightstand Book, NB 1738.

See 41 Notre Dame Lawyer 1055 wherein Assistant Professor G. Robert Blakey comments at footnote 6:

> "The 'Nightstand' books have been aptly described as 'unqualifiedly pornographic' and just as obviously 'thrown together' for a 'quick sale'. Lacking literary merit, they neither shock nor offend because they are so blatant and blunt. Written in a dull and slimy style, they are void of subtlety and spare nothing for the imagination."

Slough and McAnany, Obscentiy and Constitutional Freedom—Part I, 8 St. Louis University Law Review 279, 331 Note 189 (1964).

See also CDL Brief Amicus Curiae in *Redrup v. N.Y.*, Oct, Term 1966, No. 3 at page 30, reading:

> "The reputation of Nightstand Books, Ember Books, Leisure Books, Pillar Books, Sundown Readers, Midnight Readers, Evening Readers are well known—notoriously known, to the book sellers on 42nd Street. . . .
>
> "Similar books from the same publishing firm have been held: (1) to be hard-core pornography by the New York Court of Appeal under the New York obscenity statute. *Keney v. N.Y.*, in the Supreme Court of the United States, October Term 1966, No. 2 (Lust School, Lust Web, Sin Servant); *N.Y. v. Motherson*, 16 N.Y. 2d 509 (Lust Team); *Fried v. N.Y.*, 238 N.Y.S. 2d 742, cert. den. 378 U.S. 578 (College for Sinners); (2) to be hard-core pornography by the Supreme Court of Kansas under the Kansas obscenity statute. *A Quantity of Books v. Kansas*, 19 Kans. 13, 379 P. 2d 254, reversed on procedural grounds 378 U.S. 205 (Born for Sin, No Longer a Virgin, Sin Girls, Sin Hotel, Miami Call Girl, Lesbian Love, Sex Jungle, The Lustful Ones, The Wife Swappers, Sex Model, The Lecher,

At the commencement of the Hamling trial, District Judge Joe Ingraham made the following statement to counsel:

> "Now, I want to make this announcement, that I intend to try this case on the pattern of the Aday case in the Sixth Circuit, which was affirmed by the Sixth Circuit, and to the extent that it is applicable to this case, I expect to charge the jury in much the same manner, so, if that is any assistance to counsel on either side of the table, we have to proceed in one way or another, and that is a case that I expect to follow."[20]

Lust Goddess, Sin Camp, $20.00 Lust, Convention Girl, The Isle of Sin, Orgy Town, Sex Spy, Trailer Trollop, Flesh Is My Undoing, Sex Circus, Malay Mistress, The Sinning Season, Sin Song, Passion Slaves, The Sinful Ones, Lover, Passion Trap, Sin Cruise, Seeds of Sin); *Kansas v. A Quantity of Books*, 197 Kans. 306 (July 14, 1966) (Sin Hooked, Bayou Sinners, Lust Hungry, Shame Shop, Fleshpot, Sinner's Seance, Passion Priestess, Penthouse Pagans, Shame Market, Sin Warden, Flesh Avenger); (3) to be obscene by the Circuit Court of Appeals for the Second Circuit under the federal obscenity statute, *Books Inc. v. U.S.*, 358 F. 2d 935 (April 12, 1966), (Lust Job); (4) to be obscene by the Illinois Supreme Court under the Illinois obscenity statute, *Illinois v. June Sikora*, 204 N.E. 2d 768 (Jan. 21, 1965) (Crossroads of Lust, Passion Bride, Lust Campus); see also *Illinois v. Pascarello*, unreported X64-2122, 2123, a jury verdict holding "Sin Bin" and "Shame Hunger" obscene; (5) to be obscene by the Georgia Supreme Court under the Georgia obscenity statute, *Corinth Pubs. Inc. v. Wesberry*, 146 S.E. 2d 764 (Dec. 18, 1965), (Sin Whisper); (6) to be obscene by the Appellate Division of the Circuit Court of Connecticut under the Connecticut obscenity statute, *Conn. v. Onorato*, 2 Conn. Cir. 428, 199 A. 2d 715, 716 (Wild Flesh, The Orgy Boys). The similarity in the trademark of such books and their patent offensiveness can be recognized at a glance." Photographs of the front and rear covers of 46 of the paperbacks described above appear in the appendix to the CDL-Redrup brief (photos, pp. 1-12).

[20]Reporter's daily transcript of proceedings, August 2, 1966, pages 964-965. See also petitioner's reply to the memorandum for the United States herein at page 3, footnote 1.

At the conclusion of the trial however, the U.S. Attorney abandoned the law set forth in *Roth* and asked that the test for obscenity given by Judge Fox be changed *to require proofs as to three separate elements.*[21]

Burdened with a redundant and misleading instruction such as this, it was no mystery as to why the jury was hung after nine days of deliberation.[22] One juror gave his personal evaluation of the instruction in an interview after the mistrial was declared. The Houston Post of September 3, 1966, reported his account as:

> "Another juror, Jack Hardie, 6355 Underhill, said he felt the three tests for legal obscenity were drafted in an ambiguous manner *purposely to prevent 12 people from being able to agree.*" (Our emphasis).

Amicus submits that the juror stated the obvious. How can a jury not be misled when it is told that after it finds that the dominant theme of the material and the publisher's intent (presumed) is an appeal to prurient interest which is substantially beyond customary limits

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[21]See Houston Chronicle dated Aug. 23, 1966, page 6, section 1 reading "Federal Judge Joe Ingraham today agreed to give the jury a more restrictive definition than he had planned, Prosecutor Morton Susman asked the judge to define obscene in line with the recent U.S. Supreme Court decision in a case involving the book 'Fanny Hill'. This decision further clarifies the three elements the prosecution must prove to establish the matter is obscene: the material in question exceeds the national standards on sexual candor, appeals to the prurient interest of the readers, and lacks any social value. Susman said that the more restrictive definition would make the case more difficult for the prosecution, but that he thought it more proper from a legal standpoint."

[22]To complicate matters, the trial judge refused to charge the jury on "pandering", holding there was insufficient evidence of the same. Houston Chronicle, Sept. 4, 1965. The Houston Post, Sept. 3, 1966, reported "an unofficial tabulation of jury voting indicated the closest they came to a unanimous opinion was a 10-2 vote that the defendant had 'specific intent' to violate the law."

of candor (patently offensive), *it must also find that it is utterly without redeeming social value!* Under this instruction the jury is actually misinformed as to the basic reason for proscribing obscenity, the inference being that the law sees nothing wrong with the appeal to the prurient interest described in *Roth.* On this issue, the remark of defense attorney Rembar in the *Fanny Hill* arguments [Tr. p. 7] and Justice Brennan's comment thereon, appear in point.

> "MR. JUSTICE BRENNAN: Doesn't it mean that? We are dealing with, I guess, by hypothesis with what is pornographic material as to which, however, a lot of acknowledged literary critics are willing to say it has some literary and therefore social value, because it is well written.
>
> "MR. REMBAR: If by pornographic your Honor means sexually arousing or lustful in terms of the decisions, the answer is yes. *I think it has been clear for some time that material whose effect is to stimulate a sexual response in the normal person is not for that reason to be denounced. I think that* such—(our emphasis).
>
> "MR. JUSTICE BRENNAN: Roth said that?"

The misleading quality of the jury instruction is pointed up by comparing it with the simple statement appearing in the Utah Statute (*supra*) *which defines "prurient interest"* (*i.e.*, a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor) *itself, as a matter which is utterly without redeeming social importance.*

The California experience with Penal Code Section 311.2 as enacted by the 1961 Legislature (*supra*) has

been identical. Its enactment and the prosecutors' experience thereunder was a signal for prosecutors to cease trying to enforce the law. Using this test, the California courts have guaranteed immunity to the publishers as they flood the nation with smut materials from the refuge of that state. See CDL Brief Amicus Curiae in Fanny Hill at pages 81-85; 41-43 nor has this Court's recent decisions in *Ginzburg* and *Mishkin* changed this result. On Tuesday, November 8, 1966, the Los Angeles Daily Law Journal reported the most recent California "experience" under the view of the law which petitioners herein and the Solicitor General urge upon this Court.

> NOT OBSCENE IS RULING ON BOOKS BY JUDGE HOLLAND.. A Superior Court judge Friday dropped conspiracy charges against four men accused of publishing and distributing obscene paperback books.
>
> Judge Kenneth L. Holland ruled that books were not obscene even though he said they "fall short of satisfying the customary limits of candor . . ."
>
> The books, entitled "Lust in Leather," "Whipped Passions," "Perversion Unique" and "Club Unique," were said, by Judge Holland to follow a uniform format . . . just barely within the plae of obscenity statutes and court decisions.
>
> Freed from an earlier indictment were David Zentner,[23] 47, and editor and distributor, and Reuben Sturman, 37, both of Cleveland, Ohio.

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[23]Zentner's form letter of "requirements" to his authors in the Boudoir Classic series appears in CDL's Brief Amicus Curiae in *Fanny Hill* at page 81. Said Zentner in part: "What we basically seek is off-beat sex, with an emphasis on deviations. . . . Pest is secondary . . ."

Also cleared were writer Will Kunne, 46, of Rialto, and Tom Vail, 57, of 2311 Meadowvale St., Los Angeles.

In his decision, Judge Holland noted that the books, distributed in a series entitled "Boudoir Classics," appeal to the "average man's insatiable curiosity in sex, in all its forms, as may be inferred from enormous sales volume in night stand type books."[24]

Judge Holland's opinion further stated that none of the books can be said to "appeal predominantly as a whole to any single deviant group or combination of groups, such as the material designed for homosexuals."

Arguments by defense attorney claimed there were more than 37 million "night-stand type" books with a retail value of more than $25 million.

The four originally were indicted in December, 1964.

Conclusion.

Amicus respectfully submits that this Court stands at a crossroad.

This Court's obscenity decisions between 1958-1964, although misunderstood by a substantial number of attorneys, courts and commentators, have followed a pattern which is both logical and consistent. See CDL Commentaries on the Law of Obscenity, Vol. 1, No. 3, pages 1-1 through 1-11 and Brief Amicus Curiae of

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[24]Judge Holland's use of the "enormous sales volume in Night-stand type books" as a level of reference is evidence that this Court's past decisions in previous restraint cases have given scandal to the lower Courts and are at the root of the obscenity confusion in the courtroom. See CDL Commentaries of the Law of Obscenity Vol. 1, No. 2 at pages 1-7 (bottom of page).

CDL in *Ginzburg v. U.S.*, pages 32 to 53. The majority opinion in *Ginzburg* and *Mishkin* and the no clear majority decision and the separate opinion of Justices Warren, Brennan and Fortas, properly interpreted, continue this pattern and give promise of bringing complete understanding to what has been described as a muddied area of the law. See Natl. Decency Reporter, Vol. 3, No. 6, June-July 1966, "Analysis of the Ginsburg, Mishkin and Fanny Hill decisions" and Obscenity in the Supreme Court by G. Robert Blakey appearing in America (August 13, 1966 edition) at page 156.

In this case, a collateral attack is being made on *Roth,* which, if allowed to succeed gives every promise of destroying the progress made by the Court thus far. It is not fanciful thinking to predict that, were this Court to engraft an additional requirement onto the *Roth* test in the manner urged by petitioner, the same would create greater havoc than did this Court's development of restrictive rules in previous restraint cases during the period 1958-1964—but even worse, it would introduce a notion which is basically unsound, namely, that the public policy of this Court does not look upon the appeal to prurient interest, described in *Roth,* as being utterly without social importance.

We view the present controversy with the utmost concern and earnestly solicit this Court not to follow the primrose path which the parties herein have made so inviting. The petition for certiorari should be denied.

Respectfully submitted,

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